

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOIVA M. UIAGALELEI and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 02-904; Submitted on the Record;
Issued October 2, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$6,680.23; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of the overpayment which, therefore, was not subject to waiver.

The Office accepted appellant's claim for fracture of the left wrist, aggravation of arthritis and surgery on the left wrist in 1982, 1983, 1984, 1989 and 2000. By decision dated March 12, 1998, the Office terminated appellant's compensation effective March 12, 1998 because he refused an offer of suitable work. Appellant requested an oral hearing before an Office hearing representative, which was held on June 4, 1998. By decision dated August 17 and finalized on August 19, 1998, the Office hearing representative affirmed the Office's March 12, 1998 decision.

On May 23, 2000 the Office made a preliminary determination that appellant was overpaid \$6,680.23, because the Office erroneously paid appellant compensation in the amount of \$6,680.23 from January 29 through March 31, 2000, after the Office had terminated his compensation benefits. The Office determined that appellant was at fault in the matter of the overpayment because he received the pretermination notice of February 4, 1998 and the Office's March 12 and August 17, 1998 decisions informing him that he was no longer entitled to benefits as of March 12, 1998 and, therefore, he knew or should have known the payment of \$6,680.23 was incorrect.

Appellant requested an oral hearing before an Office hearing representative but subsequently opted for review of the written record.

On December 3, 2001 the Office hearing representative finalized its determination that appellant received an overpayment of compensation in the amount of \$6,680.23 and that he was at fault in the creation of the overpayment. The Office hearing representative found that appellant did not submit a complete financial recovery questionnaire as requested and, therefore,

a repayment plan could not be formulated. She stated that the Office should pursue recovery of the overpayment in full.

The Board finds that appellant received an overpayment of \$6,680.24.

By decisions dated March 12 and August 17, 1998, the Office terminated appellant's compensation effective March 12, 1998 because he refused an offer of suitable work. On January 24, 2000 appellant filed the Form CA-7, for compensation from January 29 through March 31, 2000 and the Office erroneously issued appellant a compensation payment for that time period in the amount of \$6,680.23. He does not dispute the amount of the overpayment.

The Board finds that appellant was at fault in the creation of the overpayment.

Section 8129(b) of Federal Employees' Compensation Act¹ provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."² Thus, the Office may not waive the overpayment of compensation unless appellant was without fault. Adjustment or recovery must, therefore, be made when an incorrect payment has been made to an individual who is with fault.³

In determining whether an individual is with fault, section 10.433(a) of the Office's regulation provides in relevant part that a claimant is with fault in the creation of an overpayment when he or she: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which he or she knew or should have known to be incorrect.⁴

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time he received the compensation check in question, he knew or should have known that the payment was incorrect.⁵ By the Office's decisions dated March 12 and August 17, 1998, he knew or should have known that his compensation has been terminated effective March 12, 1998. Further, by letter dated March 16, 1999, the Office informed appellant that the March 12 and August 17, 1998 decisions established that he was no longer entitled to compensation benefits. The Office, therefore, properly determined that appellant was at fault in the creation of the overpayment and the overpayment is not subject to waiver. Moreover, since claimant was no

¹ 5 U.S.C. § 8129(b).

² *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

³ *Diana L. Booth*, 52 ECAB ____ (Docket issued No. 99-1760, May 10, 2000); *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

⁴ 20 C.F.R. § 10.433(a) (1999).

⁵ *Diana L. Booth*, *supra* note 3.

longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.⁶

The December 3, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 2, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ See *Robert S. Luciano*, 47 ECAB 793 (1996).